86-204

Supreme Court, U.S.
FILED
AUG 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. A-927

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ADVANCE BUILDING MAINTENANCE COMPANY,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SAM ZALMAN GDANSKI, ESQ.
Attorney for Petitioner
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Spring Valley, New York 10977
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QUESTIONS PRESENTED

Whether the decision of the Court of Appeals in the Federal Circuit denying the appeal of the Appellant violates the due process provisions of the Constitution by virtue of its failure to recognized that current Commercial Law permits excusal from a contract where it is impracticable as the contract price because a failure to recognize said concept will have the effect of bankrupting the contractor and giving undue enrichment and unjustment to the Government.



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IN THE SUPREME COURT OF THE UNITED STATES

Term, 1986

No.

ADVANCE BUILDING MAINTENANCE COMPANY,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE UNITED STATES

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

ADVANCE BUILDING MAINTENANCE COMPANY, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit of April 30, 1986, of which rehearing was denied on May 8, 1986.

OPINIONS BELOW

The order of the United States Court of Appeals for the Federal Circuit

of March 12, 1986 is printed in Appendix A hereto, infra, page 16. The order denying rehearing is printed in Appendix A hereto, infra, page 18, dated May 8, 1986.

JURISDICTION

The judgment of the United States Court of Appeals For the Federal Circuit (Appendix A, infra, page 16) was entered on March 12, 1986. The petition for rehearing was denied on May 8, 1986 (Appendix A, infra, page 18). The jurisdiction of the Supreme Court is invoked under Title 28 of the USCA Sec. 1255.

QUESTIONS PRESENTED

Whether the decision by the Court of Appeals for the Federal Circuit denying the appeal of the Appellant violates the due process provisions of the Constitution by virtue of its failure to recognize that current Commercial Law permits excusal from a contract where it is impracticable at the contract price because a failure to recognize said concept will have the effect of bankrupting the contractor and giving undue enrichment and unjustment to the Government.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

This case involves the fourth section of the Fifth Amendment to the Constitution of the United States, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Wrongful and intentional acts are the basis of this action brought by Advance Building Maintenance Company. The decision of the Armed Services Board of Contract Appeals 27183 and 28219 were reviewed by the Court of Appeals for the Federal Circuit. The contract F03602-82-C-0003 was awarded by the Base Contracting Division at Little Rock Air Force Base, Arkansas. This was the first such mess services attendant contract that the Appellant ever obtained and, thereafter, ceased performance due to the fact that it was losing more than Twenty Thousand and 00/100 ($20,000.00) Dollars a month. The Appellant's contention was that its default was excused based on the theories of mistake in bid, commercial impracticability, overreaching and unconscionability. The Board awarded the Government Four Hundred Five Thousand Five

Hundred Seventy Four and 79/100 $475,574.79) Dollars in excess reprocurement costs.

THE FACTS

The Contracting Officer in originally evaluating the Appellant's bid believed that it was too low and suspected a mistake in bid. In fact, its own food services officer, who was the technical representative who prepared the Government's estimate felt that the Appellant's bid was too low. The Contracting Officer requested several verifications from the Appellant but never disclosed the Government's own dollar estimate of the job. This was particularly and specifically important because this is the first time a new format was to be utilized by the Government and any other information furnished the contractor would be meaningless.

The Appellant provided food services and it became apparent that it was in a position of continually losing

Twenty Five Thousand and 00/100 ($25,000.00) Dollars and was forced to cancel the job. The Government thereafter terminated the contract for default and reprocured the services from another contractor. The Government then attempted to assess the contractor but not only with the first year's difference in price, but also the excess reprocurement costs for the second and third year which is totally unconscionable. Since these are option years, it would have been obvious that the Government should have been prevented from awarding an option follow on contract where it was calculated to have the effect of putting a contractor out of business.

SUMMARY OF ARGUMENTS

Prior to bid award, the Government withheld material information from Appellant in the form of the Government's own dollar estimate of the cost.

According to Case Law as established by both the Board of Contract Appeals and the U.S. Court of Appeals, such cost estimates have been found to be so material that by not disclosing them under certain circumstances, the Government failed to take sufficient verification action and violated procurement regulations. The Board had concluded that the Government's estimate was immaterial. The Board is incorrect in its conclusion and failed to apply the appropriate Case Law which clearly supports the Appellant's contention that the Government acted improperly in its verification of bid procedure. Next, the Government's action in withholding its estimate and awarding Appellant a contract that it felt was a very low price, constituted overreaching and resulted in an unconscionable contract. Third, even if the Government had not

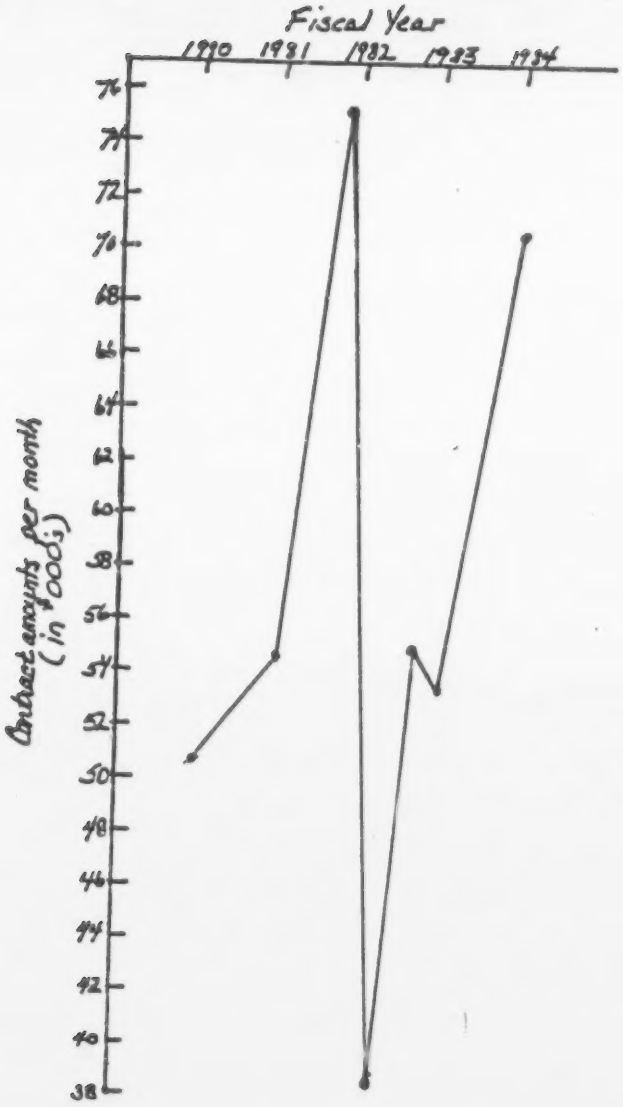
withheld the material information, the contract as awarded to the Appellant was unconscionable. The below graph as evidenced the Appellant's $38,921.00 bid is sufficiently and appreciably outside the mainstream of prior contractors or subsequent contractors. To hold a contractor to this dollar amount and assess the excess reprocurement costs will bankrupt him.

Contractor	Contract Amount Per Month
Chesapeake FY1980	$ 50,826.36
Chesapeake FY1981	54,955.62
Chesapeake Oct.-Dec. 1981	75,024.00
Advance Building Maintenance Company* FY1982	38,921.00
Moore's Cafeteria Remainder FY1982 (May-Sept.)	55,000.00
Moore's Cafeteria FY1983	53,833.33

Contractor	Contract Amount Per Month
Hamilton Enterprises FY 1984	$ 70,877.25

*First AFSCAG contract, additional work added.

The information supplied in this chart has been plotted graphically for illustration purpose as follows:


Fiscal Year
1980
1981
1982
1983
1984
Contract amounts per month
(in $000's)
76
74
72
70
68
66
64
62
60
58
56
54
52
50
48
46
44
42
40
38

REASONS FOR GRANTING WRIT

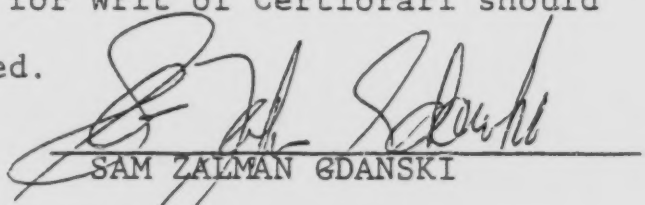
The right under the due process clause of the United States Constitution requires a fair hearing and not take away a contractor's property without just compensation. According to the Restatement (Second) of Contracts, Section 261 comment d (1979), the standard for commercial impracticability is satisfied where performance was impracticable at the contract price, "because (of the) extreme and unreasonable difficulty, expense . . . or loss to one of the parties involved." The Board recognized the validity of the accounting analysis performed by Arthur Andersen & Co. for Appellant. In its decision, the Board noted that the Appellant had established that its loss on the instant contract was $118,000.00. The Board also found that the Appellant incurred an overall business loss of $57,034.00 for fiscal

year 1982. Although the Board did not feel it necessary, Arthur Andersen & Co., the accountants, who rendered testimony, also analyzed the potential loss that Appellant would have incurred had it continued to perform until October 1, 1982, the first year only which would have been $191,251.00 resulting in an overall business loss for that year of $130,247.00. This does not even consider the imposition of punishment for the second and third year. To require and neglect to recognize the rules of modern day courts in recognizing commercial impracticability even by objective standards just because this is a Government contract, violates the contractor's constitutional safeguards. Recognized Case Law before the Court of Appeals for the Federal Circuit and Government Contract Law in the Clarke Case, ASBCA No. 24306, 82-1 BCA Par.15627

(Jan. 29, 1982) and the Hamilton Case, U.S. v. Hamilton Enterprises, Inc., 711 F2d 1038 (Ct. App. Fed. Cir. 1983) have recognized that where the Government fails to provide the contractor with the requisite specific important information which in this case was a dollar amount is unfair for the Government then to require the contractor to perform at his own bankruptcy.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.



SAM ZALMAN GDANSKI

Attorney For Appellant

APPENDIX

APPENDIX A

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ADVANCE BUILDING MAINTENANCE COMPANY, Appellant,	)	Appeal No. 85-2505
v.	)	
THE UNITED STATES, Appellee.	)	

DECIDED: March 12, 1986

Before MARKEY, Chief Judge, FRIEDMAN, Circuit Judge, and RE, Chief Judge, United States Court of International Trade.*/

PER CURIAM.

The decision of the Armed Services Board of Contract Appeals (Board) ASBCA Nos. 27183 and 28219, denying the appeals by the appellant from decisions of the contracting officer, is affirmed on the basis of the opinion of the Board, reported at 85-2 B.C.A. (CCH) Par. 18,706 (1985).

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*/ Sitting by designation pursuant to 28 U.S.C. Sec. 291(a).

United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439

Francis X. Gindhart

Clerk Date: May 8, 1986

Appeal No. 85-2505, Advance Building Maintenance Company v. U.S.

Dear Mr. Gdanski:

Your recently submitted paper cannot be filed for the following reason(s):

( ) Your entry of appearance was not filed. CAFC Rule 7

( ) You are not admitted to the bar of this Court. CAFC Rule 6

(X) This paper is out of time. FRAP 40

( ) Additional copies are needed. FRAP 27(d)

(X) Other The mandate issued in this appeal April 8, 1986; therefore, this Court no longer has jurisdiction in this case.

This paper is:

(X) Returned to you herewith.

( ) Retained pending correction of the noted

discrepancy.

If you have any questions or need assistance, please contact the Clerk's Office.

Very truly yours,

Francis X. Gindhart

By:

Elizabeth J. Carroll

Deputy Clerk

*Motion For Rehearing En Banc

SUPREME COURT OF THE UNITED STATES

No. A-927

ADVANCE BUILDING MAINTENANCE COMPANY,

Applicant,

v.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 9, 1986.

/s/ Warren E. Burger

Chief Justice of the United States

Dated this 3rd
day of June, 1986.